Supreme Court, U.S.
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No. 95-432

In The

Supreme Court of the United States

October Term, 1995

RONALD L. AARON, *et al.*,

Petitioners,

vs.

THE CITY OF WICHITA, KANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is pay given a firefighter for four self-scheduled days off work each year ("Kelly days") within the class of "payments made for occasional periods when no work is performed due to vacation . . . or other similar cause, . . . and other similar payments to an employee which are not made as compensation for his hours of employment" that are excluded from an employee's "regular rate" of remuneration by Section 7(e)(2) of the Fair Labor Standards Act, 29 U.S.C. § 207(e)(2)?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the City of Wichita, Kansas, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by petitioners.

STATEMENT OF THE CASE

This is a lawsuit brought against the City of Wichita, Kansas, by some of its firefighters. In their complaint, the firefighters alleged that the City had violated the Fair Labor Standards Act ("FLSA") because it had (1) failed to pay them for sleep and meal-time hours; (2) incorrectly characterized Fire Captains, Battalion Chiefs, and Division Chiefs as executive employees exempt from FLSA overtime provisions; and (3) incorrectly calculated the firefighters' FLSA "regular rate" of compensation by (a) incorrectly paying the firefighters based on hourly pay rates set out in collectively bargained pay agreements, despite the parties' alleged contrary intent; (b) failing to include pay for the firefighters self-scheduled quarterly days off work ("Kelly days") in the regular rate computation; and (c) including overtime hours in the regular rate computation.

On cross motions for summary judgment, the United States District Court for the District of Kansas ruled that (1) the City had paid the firefighters for all hours on duty, including sleep and meal-time hours, and was entitled to judgment on that claim; (2) the Captains and Chiefs were not salaried employees, but were paid hourly, were therefore not exempt executive employees, and were entitled to overtime pay; and (3) the City had miscalculated the

firefighters' FLSA regular rate of pay, and therefore owed them additional pay for both straight time and overtime hours. The District Court agreed with the City that pay for Kelly days was a form of vacation pay,[1] and properly excluded from the City's regular rate calculation, but held that the City had incorrectly excluded overtime hours from its calculation, and had incorrectly relied on the hourly rates set out in the collectively bargained pay agreements.[2]

The firefighters did not appeal the District Court's ruling that the City had paid them for all hours on duty.[3] The City, however, did appeal the District Court's rulings that the Captains and Chiefs were entitled to unpaid overtime pay, and that the City had incorrectly calculated the firefighters' regular rate and thus underpaid them. On appeal, the Court of Appeals for the Tenth Circuit

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[1] Because the District Court mistakenly believed that the City was crediting its Kelly days payments against its overtime liability, in its order of June 17, 1992, it initially accepted the firefighters' contentions that Kelly days should be excluded from the regular rate computation. *See* Petition for Writ of Certiorari, App. 30-32. The District Court corrected its error in its March 9, 1993, order, and adopted the City's view on the Kelly days issue. *See id.* at App. 46-47.

[2] The District Court also ruled that the City had not acted willfully, or in bad faith, and that petitioners were therefore not entitled to liquidated damages under 29 U.S.C. § 260 or to a three year limitations statute under 29 U.S.C. § 255(a). *See* Petition for Writ of Certiorari, at App. 59-66.

[3] The Firefighters did appeal the District Court's ruling that the City had not acted willfully, or in bad faith. The Court of Appeals did not reach those issues, instead ruling that the City had not violated the FLSA at all.

reversed both District Court rulings. The Court of Appeals held as a matter of law that the Captains and Chiefs were salaried employees, and remanded for further factfinding on the exemption issue. The Court of Appeals also held as a matter of law that the City had properly treated Kelly days and overtime pay in its calculations, and that the collectively bargained pay agreements reflected the parties' actual intent, and remanded for entry of judgment in the City's favor on the regular rate claim.

The ***only*** question presented in the Petition for Writ of Certiorari is whether payments for Kelly days are properly excluded from the regular rate determination because they are a form of vacation pay. The firefighters are normally scheduled to work every third day, with one work shift of 24 consecutive hours followed by 48 consecutive unpaid hours off work.[4] The City also affords them a variety of forms of paid time off from their regular schedule, including Kelly days and "variable" vacation days. The firefighters schedule their Kelly days, one day per quarter, through a seniority-based bidding system; they also schedule "variable" vacation days at the same time, using the same bidding system. Kelly days differ from variable vacation days in that (1) all firefighters earn four Kelly days annually (one day per quarter), whereas the amount of variable vacation a firefighter earns each year is a function of his seniority and attendance; and (2)

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[4] Unless another citation is given, all factual statements in this Brief in Opposition are taken from the opinion of the Court of Appeals, Petition for Writ of Certiorari, at App. 1-17, or the two initial opinons of the District Court, *id.* at App. 18-67.

a firefighter must schedule one Kelly day each quarter, and cannot carry Kelly days forward, whereas variable vacation days can be taken at any time within the year, and can be carried forward. Otherwise, Kelly days and variable vacation days are regarded as functionally equivalent by the firefighters. As petitioner Barnes testified:

> Q. Kelly days? Where it started and how and what it means?
>
> A. What it means for us is just another day off.
>
> Q. Is it like a vacation day?
>
> A. It is for me.
>
> Q. It is scheduled the same general way as a vacation day, is it not?
>
> A. With the exception that you can only have one in a quarter, yes.

10th Cir. Aplt. Supp. App. at 161-62. Petitioner Huntsperger testified to the same effect:

> Q. And you sign up for [Kelly days] at what time?
>
> A. Sign up for those when we draw vacations in October and November.
>
> Q. When you have a Kelly day what – is it essentially like a vacation day in that you are free to do whatever you want?
>
> A. Yes.
>
> Q. You have no restrictions on where you go or what you do or that type of thing?
>
> A. No.

Q. Is that correct?

A. Yes.

10th Cir. Aplt. Supp. App. at 164.

It should be noted that petitioners make several erroneous factual statements about Kelly days; petitioners either supply no record citation to support these assertions, or supply record citations that do not support their assertions. Thus petitioners erroneously state that "[r]espondent admitted the parties had contracted for Kelly days and that they were designed to reduce the number of hours of work of the petitioners and its overtime liability," Petition for Writ of Certiorari, p. 8, that "[t]he term 'Kelly days' . . . is commonly used in Fire Departments throughout the country to refer to forced absences from work to minimize overtime hours," *id.* at 7 n.2, that Kelly days are "regularly occurring absences intended by [the City] to reduce hours worked and overtime liability" and that Kelly days "reoccur at fixed intervals," *id.* at 11, 12-13. None of these statements has record support, and none is true. The City of Wichita's use of Kelly days, which do ***not*** occur at fixed or regular intervals, long predates the applicability of the FLSA to municipalities, and thus cannot have been "designed" to reduce FLSA overtime liability. *See, e.g.*, 10th Cir. Aplt. Supp. App. at 1, 5, 15-17, 19, 29, 48, 55, 72-73, 75, 83, 100, 105.

The District Court held that Kelly days should be excluded from the regular rate computation; it based its ruling on 29 U.S.C. § 207(e)(2), which provides that the regular rate shall not be deemed to include

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause.

Petition for Writ of Certiorari, at App. 46-47. The Court of Appeals reached the same conclusion; it explained that "after reviewing the record, we believe that 'Kelly days' were simply another form of paid vacation . . . . " *Id.* at App. 8. The sole question that petitioners ask this Court to review, therefore, is a question that both the District Court and the Court of Appeals have resolved against petitioners.

REASONS FOR DENYING THE WRIT

Petitioners suggest that this Court should grant certiorari in this case because, in their view, the District Court and the Court of Appeals both erred in holding that Kelly days are a form of paid vacation, or other "similar" paid leave, which is by statute excluded from the FLSA regular rate calculation. Petitioners further suggest that the Kelly days rulings of the courts below particularly merit review because, they say: (1) the rulings below conflict with the plain language of the FLSA; (2) those rulings conflict with the FLSA's underlying purpose; (3) those rulings conflict with the applicable administrative regulations; (4) the Kelly days issue is important because the rulings below, if allowed to stand, will negatively affect firefighters nationwide; and (5) the rulings below conflict with this Court's prior decisions. None of petitioners' proffered reasons for review has merit. The decisions at issue are not merely correct; they are fully

consonant with the FLSA's language and purpose, and with the apposite administrative regulations, they are entirely unremarkable, and they do not conflict in the least with this Court's prior FLSA decisions.

I. The Rulings Below Are Obviously Correct, and Entirely Unremarkable

Whether the District Court and Court of Appeals correctly held that pay for Kelly days could be excluded from the FLSA "regular rate" calculation depends on whether Kelly days are "vacation" (or similar thereto) as defined in Section 7(e)(2) of the FLSA, 29 U.S.C. § 207(e)(2), and its interpretive regulations. That statute provides in relevant part that an employee's remuneration, for "regular rate" purposes, does not include

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide work, or other similar cause . . . and other similar payments to an employee which are not made as compensation for his hours of employment.

Neither the FLSA, nor its legislative history, nor its case law, nor its interpretive regulations, define Section 7(e)(2)'s term "vacation."[5] The term therefore cannot have been intended to have some idiosyncratic meaning, and should be interpreted as bearing its ordinary meaning: "A period of time devoted to pleasure, rest, or relaxation,

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[5] Petitioners agree that there is nothing in the legislative history or case law that directly bears on the meaning of Section 7(e)(2)'s term "vacation." *See* Petition for Writ of Certiorari, at 14.

especially one with pay granted to an employee." American Heritage Dictionary, at 1969 (3d Ed. 1992). The interpretive regulations do indicate that, to qualify for the Section 7(e)(2) exclusion, payments must be "in amounts approximately equivalent to the employee's normal earnings for a similar period of time," 29 C.F.R. § 778.218(a). The City's practice meets that requirement, however: Firefighters are paid at the same hourly rate for "Kelly days" and "variable" vacation as they are paid when they are at work. The regulations also indicate that the absences paid for must be ones which are "infrequent or sporadic or unpredictable," rather than regular "absences," such as a lunch period or regularly scheduled day of rest, and explain by way of example that "Sundays may not be workdays in a particular plant, but this does not make them either 'holidays' or 'vacations.' " *Id.* § 778.218(b). The regulations also explain, with respect to the statutory term "other similar cause" that

> The term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, sickness, and failure of the employer to provide work. Examples of "similar causes" are absences due to jury service, reporting to a draft board, attending a funeral of a family member, inability to reach the workplace because of weather conditions. Only absences of a nonroutine character which are infrequent or sporadic or unpredictable are included in the "other similar cause" category.

29 C.F.R. § 778.218(d).

In light of these definitions and examples, the City's payment of its firefighters for Kelly days – four paid days off work each year, no more than one day per quarter,

scheduled by the firefighters themselves pursuant to the same a seniority-based bid system that sets their variable vacation days – on its face qualifies for the Section 7(e)(2) exclusion. Kelly days obviously fit the dictionary definition of "vacation." The firefighters are paid the same amount for a Kelly day as for a normal day at work. Any given firefighter has a Kelly day only infrequently (no more than once in any three-month period). And, because of the vagaries of the seniority-based bid system, under which the specific day on which a firefighter takes a Kelly day or variable vacation day is a function of his own preferences, his relative seniority, and the preferences of more-senior firefighters who bid ahead of him, the particular dates of any given firefighter's future scheduled Kelly days will be both sporadic ("occurring at irregular intervals," American Heritage Dictionary, *supra*, at 1742) and unpredictable ("difficult to foretell or foresee," *id.* at 1957).

Petitioners argue that Kelly days are not vacation-like because, petitioners say, they occur at "fixed intervals." Petition for Writ of Certiorari at 13. Petitioners' factual premise, however, is false. Because firefighters are free to bid for Kelly days at any time within a three month period, and because their choices are constrained by the previous bids of more-senior firefighters, scheduled holidays, and the City's minimum staffing needs, intervals between a given firefighter's Kelly days are almost certain to be irregular.

Petitioners also argue that Kelly days are not vacation-like because they reduce the number of hours a firefighter works, and may therefore also reduce the

number of overtime hours he works. *Id.* Under this specious argument, however, ***none*** of the forms of paid leave listed in Section 7(e)(2) would qualify for exclusion from the regular rate calculation. ***Any*** paid vacation, ***any*** paid holiday, ***any*** paid personal leave, ***any*** sick leave, ***any*** of the various kinds of paid time off work mentioned in Section 7(e)(2) and its interpretive regulations, will necessarily reduce hours worked and will therefore tend to reduce overtime work; plaintiff's argument, which would reduce Section 7(e)(2) to a nullity, must be rejected.

Petitioners further assert that Kelly days are not vacation-like because they are "prescheduled" in advance; yet petitioners point to nothing in the FLSA or interpretive regulations to suggest that vacations somehow stop being vacations if they are scheduled in advance. Respondent submits that ***most*** vacations are scheduled in advance, so that the employee can plan his vacation, and so that the employer can plan how to cover the employee's work while he is gone. Indeed, petitioners' Kelly days are prescheduled at the same time and by the same seniority-based bid process as petitioners' "variable" vacation days, yet petitioners no longer contend that "variable" vacation days are outside the statutory exclusion. Again, were petitioners' approach adopted, the Section 7(e)(2) vacation exclusion would be rendered meaningless.

In sum, a natural reading of the statute and regulations fully supports the rulings of the courts below that Kelly days are simply vacation days by another name, and therefore within the statutory exclusion. Petitioners' contentions that the Kelly day rulings of the District Court and the Court of Appeals contradict the plain

language of Section 7(e)(2) and its interpretive regulations, *see* Petition for Writ of Certiorari at 11, 15, are just not true.

II. The Rulings Below Are Fully Consistent With The Statutory Purpose

Although petitioners concede that neither the statutory language nor the legislative history of the FLSA support their contention that pay for Kelly days must be excluded from the FLSA regular rate computation (a concession that directly contradicts their own assertion that the decisions below go against the "plain language" of the statute), they nonetheless argue that only their proffered interpretation of the statute is consistent with the "principal Congressional purpose" underlying the FLSA. *See* Petition for Writ of Certiorari, at 14-15. Their argument on this point, however, is based on false factual premises.

Petitioners' "Congressional purpose" argument begins with the accurate premise that the main goals of the FLSA overtime pay provisions are (1) to provide financial incentive for employers to spread employment, by hiring additional workers, rather than requiring existing employees to work long hours; and (2) to compensate workers for the extra stress of working long hours. *See* Petition for Writ of Certiorari, at 14-15 (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942)). Petitioners' argument continues, however, with two false minor premises. Petitioners first say that the City's practice of paying the same hourly rate both for hours worked and for 96 annual Kelly hours "enables [the City] to avoid

paying for 96 hours annually," *id.* at 14. Since the City ***does*** pay them for their 96 annual hours of Kelly day leave, petitioners are in essence asserting that the City should be obligated to treat Kelly days both as paid vacation ***and*** as hours worked, and should therefore pay them twice for the same hours. Petitioners also say that the City's practice (presumably its use of Kelly days) "deprives" them of their statutory right to be compensated for overtime work at one and one-half times their normal hourly rate; yet the City has always in fact paid them one and one-half times as much for overtime work as it pays them for straight time work, as the Court of Appeals noted.[6]

As the City has explained above, *see* p. 10, *supra*, all forms of paid leave, including Kelly days, reduce the total hours that employees work, and therefore tend to reduce the amount of overtime work as well. Because it grants paid leave, the City has to hire more firefighters than would otherwise be the case. Now it may be that the firefighters would prefer less paid leave and more overtime work (although the multiple forms of paid leave collectively bargained for suggest otherwise). Congress's

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[6] As the Court of Appeals explained: "The contract [between the City and its firefighters], as well as the actual practice of the parties, clearly indicate that the base salaries in [the contract] were intended to cover a standard 56-hour work week or 112 hours per biweekly pay period. The regular rate so derived meets the minimum hourly wage requirements under the FLSA and all . . . overtime requirements were seemingly met by payment of time and one-half at that regular rate for all FLSA-determined overtime hours." Petition for Writ of Certiorari, at App. 10.

intent, however, as expressed in the FLSA, is to the contrary: Congress prefers to see firefighters work fewer hours, so that more firefighters may have jobs. *See, e.g., Overnight Motor, supra.* In truth, the City's policies of giving its firefighters paid leave from work further, rather than hinder, the FLSA goal of spreading employment by reducing overtime work.

III. The Rulings Below Do Not Conflict With Prior Rulings Of This Court

Petitioners suggest that certiorari should be granted in this case in part because, they say, the Kelly days rulings below conflict with prior decisions of this Court. Petition for Writ of Certiorari, at 18-21. Petitioners repudiate their own argument, however, when they concede that until this case no court had ever considered the particular Kelly days question presented here. *Id.* at 14 ("[T]he particular question at issue does not appear to have been specifically considered by . . . the courts."), at 18 ("Petitioners have found no cases which address the excludability of paid absences which can be likened to petitioners' 'Kelly days' "). Furthermore, examination of the supposedly conflicting decisions cited by petitioners reveals that none of them involves Kelly days, vacations, or any other analogous form of paid leave. *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 429 (1945), and *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948), both stand for the proposition that all employee remuneration must be included in the FLSA regular rate computation unless within one of the statutory exclusions, but neither involves the exclusion at issue here. Likewise, *Barrentine*

v. Arkansas-Best Freight System, 450 U.S. 728, 740-41 (1981), and *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 (1945) both hold that FLSA rights cannot be contracted away, but the present case simply does not present a waiver issue. In short, the "conflict" cited by petitioners is wholly imaginary.

IV. This Case Does Not Present An Important Question That Demands Immediate Resolution

Petitioners argue that the Kelly days issue presented here is a particularly important one whose resolution will affect thousands of firefighters nationwide, who petitioners say work under pay schemes similar to that used by the City of Wichita. But petitioners cite no evidence whatsoever, whether from the record in this case, or from other sources, to suggest that the facts of this case have a parallel in any other Fire Department. Moreover, the notion that the Kelly days issue presents a burning question that demands resolution is belied by the fact that, in the nearly 60 years since the enactment of the FLSA, neither the Kelly days issue nor any close analogue has ever before been addressed. No prior case, out of untold hundreds of FLSA cases, has even mentioned the question presented here, much less disagreed with the decisions made by the Court of Appeals and the District Court in the present case. Likewise no FLSA regulation, out of the thousands of pages of FLSA regulations that appear in the Code of Federal Regulations, has ever directly dealt with such an issue. Respondents suggest that if this case presented a burning issue of FLSA construction, as petitioners would have it, FLSA litigants,

courts, and the Labor Department would not have gone 60 years without noticing.

The courts below, in a case of first impression, held that the pay the City of Wichita's firefighters receive for Kelly days – four annual days of self-scheduled paid leave that cannot be taken more frequently than one day per quarter – is tantamount to vacation pay, and therefore within the regular rate exclusion provided by 29 U.S.C. § 207(e)(2). The decisions below are correct, reasonable, and conflict with no decisions before or since; moreover, the factual grounding for the decision may be unique (petitioners have not shown to the contrary). It is therefore clear that this case presents a particularly poor candidate for this Court's discretionary certiorari review.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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